



March 19, 1999

Mr. Chris M. Borunda  
Office of the City Attorney  
The City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR99-0770

Dear Ms. Borunda:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 122831.

The City of El Paso (the "city") received a request for the original complaint and all records relating to an investigation of an allegation sexual harassment by a city employee. You indicate that you have furnished the requestor with most of the responsive information. However, you seek to withhold (1) information which may identify the complaining party and (2) recommendations regarding this matter made by a city attorney. You have supplied the subject information for our review. You have marked that information you wish to withhold.<sup>1</sup> You contend that the subject information is excepted from public disclosure by sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found.*

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<sup>1</sup>We note that you have identified portions of your "Exhibit C" as non-responsive to this request. Those portions need not be disclosed and have been marked accordingly.

*v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen* and prior decisions of this office, *see e.g.*, Open Records Decision Nos. 393 (1983), 339 (1982), a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. We have bracketed the information which would tend to identify an alleged victim or witness to alleged sexual harassment; it is confidential and must not be released to the public. We note that your claim of "informer's privilege" relates only to this information. As the information is held to be confidential, we shall not address the applicability of that exception.

We now address disclosure of legal advice and opinions expressed by a city attorney in this matter. Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.*, communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11 (1987). Information gathered by an attorney as a fact-finder, purely factual information, the factual recounting of events including the documentation of calls made, meetings attended, and memoranda sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990).

As regards information highlighted by you as excepted under section 552.107, you state: "Specifically, the redacted portions contain recommendations for disciplinary action in light of the apparent violations of the City's Sexual Harassment policy." We conclude that the recommendations included in this record may be excepted from public disclosure by section 552.107 of the Government code. We have bracketed that portion of the information which may be withheld. The balance of the information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns".

Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/ch

Ref.: ID# 122831

Enclosures: Marked documents

cc: Mr. Alan F. Jones  
1925 Septiembre Drive  
El Paso, Texas 79935  
(w/o enclosures)